No. 75-545

In the Supreme Court of the United States

OCTOBER TERM, 1975

CARLA A. HILLS, SECRETARY OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL., PETITIONERS

v.

THE SCENIC RIVERS ASSOCIATION OF OKLAHOMA AND THE ILLINOIS RIVER CONSERVATION COUNCIL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONERS

ROBERT H. BORK,
Solicitor General,
PETER R. TAFT,
Assistant Attorney General,
A. RAYMOND RANDOLPH, JR.,
Deputy Solicitor General,
HOWARD E. SHAPIRO,
Assistant to the Solicitor General,
CARL STRASS,
CHARLES E. BIBLOWIT,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

ROBERT R. ELLIOTT,
General Counsel,
K. H. SAUERBRUNN,
Assistant General Counsel,
PETER S. RACE,
Attorney,
Department of Housing and Urban Development,
Washington, D.C. 20410.

INDEX

CITATIONS

Cases:

Miscellaneous: Page

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-545

CARLA A. HILLS, SECRETARY OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL., PETITIONERS

v.

THE SCENIC RIVERS ASSOCIATION OF OKLAHOMA AND THE ILLINOIS RIVER CONSERVATION COUNCIL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 520 F. 2d 240. The findings of fact and conclusions of law of the district court are reported at 382 F. Supp. 69 (Pet. App. C).

JURISDICTION

The judgment of the court of appeals (Pet App. B) was entered on July 30, 1975. The petition for a writ of certiorari was filed on October 8, 1975, and was

granted on December 8, 1975. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the National Environmental Policy Act requires the Department of Housing and Urban Development to prepare an environmental impact statement before a disclosure statement filed with it by a private real estate developer pursuant to the Interstate Land Sales Full Disclosure Act may become effective.

STATUTES INVOLVED

The relevant portions of the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, 43 U.S.C. 4321 *et seq.*, and the Interstate Land Sales Full Disclosure Act, 82 Stat. 590 as amended, 15 U.S.C. 1701 *et seq.*, are set out in the appendix to this brief, *infra*, pp. 1A–10A.

STATEMENT

Respondents Scenic Rivers Association of Oklahoma and Illinois River Conservation Council are non-profit Oklahoma corporations organized for the purpose of protecting the Illinois River and the undeveloped portion of its environs, which some of their members use for recreation (R. 582–583; Pet. App. C, pp. 19a, 21a, 23a).[1] On April 24, 1974, respondents brought this suit in the United States District Court for the Eastern District of Oklahoma against the Secretary of the Department of Housing and Urban Development (HUD) and the Administrator of HUD's Office of Interstate Land Sales Registration

[1] "R." refers to the record on appeal.

(OILSR),[2] seeking a declaratory judgment and an injunction requiring that the defendants, "prior to approval and registration of a statement of record and property report, under the Interstate Land Sales Act, conduct an environmental study in compliance with the National Environmental Policy Act [NEPA] * * *" (R. 582–583). Alleging in their complaint that more than 3,000 homesites were being platted for sale in the Illinois River area (R. 589), respondents also sought a preliminary injunction to require the federal defendants to "[w]ithdraw approval of the Interstate Land Sales filing by the Flint Ridge Development Company" (R. 597–598).

The district court permitted Flint Ridge Development Company to intervene as a defendant (Pet. App. C, p. 19a) The company, which is an Oklahoma partnership, owns 7,000 acres of land in northeastern Oklahoma adjacent to the Illinois River (R. 860; Pet. App. C, pp. 21a, 23a). In February 1974, the company had filed with OILSR a statement of record and property report in regard to "Flint Ridge No. 1," which consisted of approximately 1,000 residential lots on 2,200 acres of the company's land that were to be offered for sale to the public (R. 860).

The company stated that the subdivision would have 11 miles of paved and 24 miles of unpaved roads; at the time of the filing, half of the road construction had been completed (R. 880). Lot purchasers would be required to obtain a septic tank permit from the County

[2] The district court dismissed other federal and state agencies named in the complaint as "additional defendants" (R. 581, 656, 661).

200-459—76——2

Health Department (R. 870)[3] and to arrange with local suppliers for gas, electricity and telephone service (R. 887–888). Various recreational facilities, including artificially-created lakes, were planned and construction on some had begun (R. 892–894, 898); one clubhouse was completed (R. 894); and the developer had built four model homes (R. 905).[4]

By the beginning of August 1974, when the district court held a three-day hearing in the case, sixteen septic tanks (all approved by local health authorities) had been installed in Flint Ridge No. 1; a number of lakes had been cleared of timber and brush; and dams and bridges had been constructed (Tr. 455, 527, 537). In developing the property, the company had spent $3,500,000 during the preceding fourteen months (Tr. 540). The Oklahoma Water Resources Board, after a public hearing, had granted the developer a permit to appropriate water from the river (Tr. 484, 526). The company had been selling lots since May 12, 1974 (Tr. 539).

A. THE INTERSTATE LAND SALES FULL DISCLOSURE ACT

The Interstate Land Sales Full Disclosure Act ("the Disclosure Act"), with which the company had complied, is designed to prevent abuses in the sale of unimproved tracts of land by requiring developers to make full public disclosure of information needed

---

[3] The company stated that the County Health officer had approved the installation of septic tanks in the subdivision (R. 889).

[4] After OILSR notified the developer of deficiencies in its filing, the company submitted an amended statement of record, which became effective on May 2, 1974 (Pet. App. A, p. 3a).

by potential buyers. S. Rep. No. 1123, 90th Cong., 2d Sess. 109 (1968). The Act is based on the full disclosure provisions of the Securities Act of 1933, 48 Stat. 74, as amended, 15 U.S.C. 77a *et seq.*, which it parallels in many aspects. 111 Cong. Rec. 27310 (1965) (remarks of Senator Williams).[5] Section 1404(a)(1) of the Act makes it unlawful for the developer of a subdivision meeting statutory criteria "to make use of any means or instruments of transportation or communication in interstate commerce, or of the mails * * * to sell or lease any lot in any subdivision unless a *statement of record* with respect to such lot is in effect * * * and *a printed property report* * * * is furnished to the purchaser in advance of the signing of any contract or agreement for sale or lease by the purchaser." 15 U.S.C. 1703(a)(1) (emphasis added).

The statement of record and the property report are prepared by the developer. They contain information describing the condition of the subdivision, its state of title, and other information of importance to potential purchasers.[6] 15 U.S.C. 1705, 1707. Under OILSR's regulations, the property report is a required part of the statement of record. 24 C.F.R. 1710.20(a) and (e), 1710.110.

---

[5] The Disclosure Act was adopted as Title XIV of the Housing and Urban Development Act of 1968, 82 Stat. 476, 590. As proposed by Senator Williams in 1965 and 1967, the Securities and Exchange Commission would have been responsible for its administration. 111 Cong. Rec. 27310–27311 (1965); 113 Cong. Rec. 315–316 (1967).

[6] The statement of record must contain: details about ownership interest in the lots involved; a description and map of the subdivision; statements describing title, terms and conditions for disposing of lots, the condition of the subdivision, including access,

The subdivision is registered by filing the statement of record and property report with OILSR, and the statement is effective only with respect to the lots specified therein. The statement becomes effective automatically on the thirtieth day after filing or such earlier date as the Secretary may determine. 15 U.S.C. 1704, 1706(a); 24 C.F.R. 1710.20, 1710.21. If the Secretary determines that the statement of record is incomplete or inaccurate in any material respect, and so notifies the developer within 30 days of filing, the effective date is suspended until 30 days after the developer files the additional information. 15 U.S.C. 1706(b).[7]

---

noise, safety, sewage, utilities, proximity to municipalities, the nature of the developers' proposed improvements, and a schedule of completion; and a statement of the consequences for individual purchasers of a failure by the persons bound to fulfill obligations under any blanket encumbrances. In addition it must contain copies of instruments of incorporation, trust or partnership of the developer or any other person holding legal title to the property; conveyance forms to be used in selling lots; any instruments creating easements or restrictions with respect to such lots; financial statements of the developer and such additional matters "as the Secretary may require as being reasonably necessary or appropriate for the protection of purchasers." Section 1406, 15 U.S.C. 1705.

The property report must contain such information from the statement of record, except copies of instruments, as the Secretary deems necessary, and "such other information as the Secretary may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of purchasers." Section 1408, 15 U.S.C. 1707.

[7] The Secretary also has the power to suspend an already effective statement, after notice and opportunity for hearing, if she determines that it includes an untrue statement of a material fact or omits to state any material fact necessary to make the statement not misleading. Section 1407(d), 15 U.S.C. 1706(d).

The Disclosure Act provides that "[t]he fact that a statement of record with respect to a subdivision has been filed or is in effect shall not be deemed a finding by the Secretary that the statement of record is true and accurate on its face, or be held to mean the Secretary has in any way passed upon the merits of, or given approval to, such subdivision." 15 U.S.C. 1716. It also prohibits any person from advertising or representing that the Secretary approves or recommends the subdivision or the sale or lease of lots in it. 15 U.S.C. 1707(b), 1716.[8]

B. THE PROCEEDINGS BELOW

1. THE DISTRICT COURT'S DECISION

The district court, agreeing with respondents' evidence at the hearing, found that the development would have a substantial actual or potential effect on

[8] The disclosure requirements of the Act are enforceable by both private and government civil remedies, and by criminal sanctions. A contract for the purchase of a lot in a subdivision is voidable at the option of the purchaser if a property report is not furnished in advance or at the signing. Section 1404(b), 15 U.S.C. 1703(b). Civil damage suits are authorized for untrue statements or omissions in the statement of record, and for sales without an effective statement of record, or without furnishing a property report to the purchaser in violation of Section 1404(a)(1), and for fraud in violation of Section 1404(a)(2). Section 1410, 15 U.S.C. 1709. Finally, under Section 1415, 15 U.S.C. 1714, the Secretary may sue to enjoin acts or practices in violation of the Act, and rules and regulations thereunder; and may refer evidence of such violations to the Attorney General, who may, in his discretion, prosecute any wilful violation as a felony, pursuant to Section 1418, 15 U.S.C. 1717. The federal and state courts have concurrent jurisdiction over civil remedies. Section 1420, 15 U.S.C. 1719.

the Illinois River and its drainage area, in part because of the effect of septic tanks (Pet. App. C, pp. 23a–24a), and that in light of the proposed prices for the lots in the subdivision and those that might later be platted, the Flint Ridge Development Company could earn a gross income of $47,250,000. "These figures," the court stated, "reflect the magnitude of the development and show that H.U.D.'s action in approving [the disclosure statements under the Disclosure Act] constituted major federal action" (*id.* at 22a).

According to the district court, "whenever a Federal agency makes a decision which permits action by other parties, public or private, which will affect the quality of the human environment, such decision constitutes major federal action" (*id.* at 26a, 28a). "Where a federal license or permit is involved, or where Congress possesses and has utilized its plenary power of regulation under the Interstate Commerce Clause, or other Constitutional authority, federal approval constitutes major federal action" (*id.* at 29a).

The court held that "[t]he approval of a filing under the Interstate Land Sales Act is in the nature of a federal license or permit, for without the approval it is unlawful to engage in sales and Congress has exercised its plenary power" under the Commerce Clause by enacting the Disclosure Act (*id.* at 29a).

The court therefore ordered HUD to conduct an environmental study of the effects of the Flint Ridge development on the quality of the human environment, specifically addressing itself to the five statutory

factors specified in Section 102(2)(C) of NEPA, 42 U.S.C. 4332(2)(C). It also "enjoined and restrained [HUD] from approving the * * * filing of Flint Ridge Development Co. until such time as the environmental impact study has been prepared and a public hearing held thereon." In addition, the court ordered HUD and OILSR "to immediately withdraw the approval of the Flint Ridge Development Co. filing" and, by its own order, declared the filing "suspended, vacated and held for naught" and prohibited all "further public sales" (*id.* at 31a–33a).

2. THE DECISION OF THE COURT OF APPEALS

On appeal by the federal defendants and Flint Ridge, the court of appeals reversed the district court's holding that there must be a public hearing on the environmental impact statement, but otherwise affirmed the lower court's decision (Pet. App. B, pp. 16a–17a). In the opinion of the appellate court (Pet. App. A, pp. 1a–12a), HUD's review of disclosure statements for adequacy under the statute and HUD's regulations (24 C.F.R. Part 1710) constitutes major federal action significantly affecting the quality of the human environment within the meaning of NEPA. A large real estate development, the court said, obviously has an environmental impact.

In the view of the court of appeals, this case involves "filing and approval of private action. The result of approval here is that the developer is free to seek funds in commerce for the development" (Pet. App. A, p. 7a). Hence, the court stated, this case is

analogous to government action in which HUD and other federal agencies approve particular projects, license them, or supply funding or financial guarantees (*id.* at 6a–9a).

The limited purpose of the Disclosure Act—to furnish potential buyers with necessary information—is irrelevant, the court ruled, because "the NEPA impact statement requirement applies to virtually all federal agencies and is not limited to those that are concerned with the environment. [It requires] attention to environmental problems regardless of whether the agency has authority to do anything about it" (*id.* at 10a). It was of no moment that under the Disclosure Act statements of record become effective within thirty days unless suspended; despite the limited grounds for suspension provided in the Act, the agency, according to the court, could routinely suspend statements of record pending the preparing and finalizing of an environmental impact statement (*id.* at 9a).[9]

ARGUMENT

INTRODUCTION AND SUMMARY

The decisions below rest on a fundamental misinterpretation of the Interstate Land Sales Full Disclosure Act and Section 102(2)(C) of NEPA, 42 U.S.C. 4332(2)(C), and would severely interfere with,

[9] The court also held that the Disclosure Act's provision for court of appeals review of orders suspending registrations for incompleteness, inaccuracy, or untrue statements or omissions (15 U.S.C. 1710) were not exclusive; the district court, therefore, had jurisdiction of the NEPA claims under 28 U.S.C. 1331 (Pet. App. A, pp. 11a–14a).

if not render impossible, the proper administration of the Disclosure Act. Under that Act, OILSR currently has on record 7,000 effective filings from developers and, if the court of appeals' reasoning were followed, the agency might have to prepare an environmental impact statement in regard to each such disclosure statement. The crushing administrative burden this would entail is graphically illustrated by the fact that the number of such environmental impact statements by OILSR would exceed the total prepared by all federal agencies during NEPA's first four and a half years.[10] Moreover, under the decision below, an impact statement might be required whenever a developer files an amendment or a consolidation of prior filings, of which there are approximately 3,000 annually.[11] Thus, even if the decision below is confined to future filings, the number of impact statements could well exceed by ten-fold the highest annual number prepared by any agency of the federal government.[12]

---

[10] By June 30, 1974, environmental impact statements had been prepared on 5,430 agency actions, of which 3,344 were final statements and 2,086 were drafts. Fifth Annual Report of the Council on Environmental Quality 388 (1974). It is estimated that in 1975, approximately 1,180 draft statements will be prepared by all agencies. Sixth Annual Report of the Council on Environmental Quality 639 (to be published in February, 1976.)

[11] Hearings on HUD-Space-Science-Veterans Appropriations for 1975 before a Subcommittee of the House Committee on Appropriations, Part 6, 93d Cong., 2d Sess. 1163 (1974); Hearings on Department of Housing and Urban Development—Independent Agencies Appropriations for 1976 before a Subcommittee of the House Committee on Appropriations, Part 5, 94th Cong., 1st Sess. 923 (1975).

[12] The Department of Transportation, which annually files the largest number of impact statements, filed 432 in 1973. Fifth An-

When a private developer's statement of record and property report becomes effective, OILSR makes no "recomn endation or report on proposals for * * * major Federal actions significantly affecting the quality of the human environment" pursuant to Section 102(2)(C) of NEPA. Accordingly, no environmental impact statement is required.

The Disclosure Act bars the Secretary from passing on the merits of, or approving, the subdivision. 15 U.S.C. 1707(b), 1716. Because Congress intended to leave land use planning and control to state and local government, OILSR has power only to assure that relevant facts are adequately disclosed to purchasers when lots are sold in commerce. It has no planning functions or power to control subdivisions, and no financing responsibilities which might put the federal government in partnership with private developers.

If the developer makes adequate disclosure, OILSR has no power to suspend the effectiveness of his statements. Such disclosure statements are required, and are filed with OILSR, only when the developer is ready to sell lots. By then, improvements to the land significantly affecting the environment may already have been made, as they were in this case.

Section 102 of NEPA is concerned with action by federal agencies in their planning and decision-making functions. Thus environmental impact state-

---

nual Report of the Council on Environmental Quality, *supra*, at 389. In contrast, in fiscal year 1974, 652 initial registrations, 520 consolidations and 3,414 amendments were filed with OILSR. In the previous year, 1,550 registration statements and 2,900 amendments were filed. These figures are from the congressional appropriations hearings, note 11, *supra*.

ments are required only when an agency has such functions, and can therefore take account of environmental consequences. The Disclosure Act does not confer such responsibilities and powers.

Requiring OILSR to file impact statements would require it to pass on the environmental merits of subdivisions, despite Congress' express determination that it should not. Indeed, because developers' statements automatically become effective in 30 days, unless suspended for inadequate disclosure (15 U.S.C. 1706), and impact statements require months for careful analysis of consequences and alternatives, Congress could not have intended Section 102(2)(C) to apply. The Disclosure Act was based upon the disclosure requirements of the Securities Act of 1933. To require agencies like OILSR and the Securities and Exchange Commission to prepare environmental impact statements for each registration would impose a massive and unnecessary administrative burden which serves neither the purposes of NEPA, nor of the statutes requiring public disclosure of information about private offerings.

THE NATIONAL ENVIRONMENTAL POLICY ACT DOES NOT REQUIRE THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT TO PREPARE AN ENVIRONMENTAL IMPACT STATEMENT BEFORE A DISCLOSURE STATEMENT FILED BY A PRIVATE REAL ESTATE DEVELOPER MAY BECOME EFFECTIVE PURSUANT TO THE INTERSTATE LAND SALES FULL DISCLOSURE ACT

Section 102(2)(C) of NEPA requires federal agencies to include "in every recommendation or report on proposals for legislation and other major Federal

actions significantly affecting the quality of the human environment" a detailed statement concerning environmental effects and alternatives. "In order to decide what kind of an environmental impact statement need be prepared"—or indeed whether any impact statement is required—"it is necessary first to describe accurately the 'federal action' being taken." *Aberdeen & Rockfish R. Co.* v. *SCRAP*, 422 U.S. 289, 322.

The Disclosure Act provides that the filing with OILSR by a real estate developer of an effective statement of record, including a property report, shall not be "held to mean the Secretary has in any way passed upon the merits of, or given approval to, such subdivision." 15 U.S.C. 1716. The Act makes it unlawful for any person to represent that the agency "approves or recommends" the subdivision; persons who willfully violate this provision are subject to fine and imprisonment. 15 U.S.C. 1707(b), 1717.

As these provisions indicate, Congress intended the Disclosure Act to serve as a means of insuring that developers provide needed information to prospective purchasers, not as a charter for an agency of the federal government to sit in judgment of real estate developments. The Senate Report [13] states:

> These requirements mean that the seller of undeveloped land covered by this title would be required to inform the purchaser not only of the desirable aspects but also of any undesirable aspects. The purchaser will then be better able to make an intelligent decision. *This proposal does not authorize the Federal Govern-*

[13] S. Rep. No. 1123, 90th Cong., 2d Sess. 110 (1968).

> *ment to pass upon the quality of what is being sold or upon such questions as land value, land use, or zoning.* Its purpose is to give the purchaser the information necessary to make his own determination of the quality of what is being sold. [Emphasis added.] [14]

OILSR's powers under the Act are thus limited to assuring that, when developers sell lots, they disclose relevant facts to potential buyers. In administering the Act, OILSR has no planning function, disburses no funds and gives no guarantees; it has no control over the design of subdivisions, no authority to suggest alternatives, and no power to stop private development. It is not, in any sense, in partnership with the private developer. Cf. *Silva* v. *Romney*, 473 F. 2d 287 (C.A. 1). It is concerned only with the adequacy of disclosure to potential purchasers of information relevant to the sale or lease of lots. And, contrary to the court of appeals' reading of the Disclosure Act, if the developer makes adequate disclosure, OILSR has no statutory authority or discretion to suspend the effectiveness of his statement, whatever the environmental consequences.[15]

Nor, as the court of appeals apparently assumed (Pet. App. A, pp. 6a, 7a–9a), is the effective filing

---

[14] Senator Williams stressed this limitation on HUD's authority in the congressional debates (114 Cong. Rec. 15272 (1968)): "It is not a regulatory statute which will permit the Federal Government to pass upon such questions as land value, its selling price, land use, or zoning. The only purpose of this legislation is to give the purchaser the necessary information upon which he can make his own investment decision."

[15] See Tr. 405–407 (testimony of John F. Weaver, Director of OILSR's Examination Division).

of a statement of record a legal prerequisite to the initial financing and other pre-sale steps in the development of a subdivision. As was the case here, a developer may be substantially funded well in advance of filing with HUD, and may put in roads, lay out lots, arrange for water and sewage, clear trees and brush, and start construction on other facilities before he is ready to sell lots. Indeed, because compliance with the Disclosure Act is a prerequisite only to the sale or lease of lots in interstate commerce (15 U.S.C. 1703(a)(1)), and not to the funding of developments, actions significantly affecting the environment can occur well before the developer is required to file his statement of record and property report.

We submit that, in light of the foregoing, NEPA is inapplicable to the effectiveness of developers' filings with OILSR under the Disclosure Act. As Senator Jackson, the principal sponsor of NEPA, stated on the Senate floor, NEPA's procedural requirements simply direct "all agencies to assure consideration of the environmental impact of their actions in decisionmaking" (115 Cong. Rec. 40416 (1969)). Thus, Section 102(2)(A) of NEPA requires federal agencies to utilize a systematic interdisciplinary approach insuring integrated use of relevant science and design arts "*in planning* and *in decisionmaking* which may have an impact on man's environment" (emphasis added). Section 102(2)(B) directs such agencies to develop methods and procedures to ensure that environmental values "may be given appropriate consideration *in*

decisionmaking along with economic and technical considerations" (emphasis added). And Section 102 (2)(C) requires federal agencies to include an environmental impact statement "in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment."

Each of these requirements in Section 102 is aimed at federal agencies that have planning responsibilities or decisionmaking powers—agencies that can take account of the environmental consequences of their proposed actions and be guided accordingly.

When disclosure statements filed by developers with OILSR become effective, OILSR is not acting in that capacity. It is not, in the words of Section 102(2)(C), engaging in "major Federal actions significantly affecting" the environment and it is not making "recommendation[s] or report[s]" on proposals for such actions—both of which are prerequisites to requiring the agency to prepare an environmental impact statement. See *Aberdeen & Rockfish R. Co.* v. *SCRAP*, 422 U.S. 289, 320. That the real estate development will have a significant environmental impact, as the district court found here, cannot transform a private project into a federal one.[16] "The action causing the impact must also be one where there is sufficient Federal control and responsibility to constitute 'Federal

[16] We do not contend that NEPA has no application whatever to the responsibilities of the Department of Housing and Urban Development, and in particular to the responsibilities of OILSR under the Disclosure Act. The issue here is narrower: whether

action' * * *." Council on Environmental Quality, Preparation of Environmental Impact Statements: Guidelines, 40 C.F.R. 1500.6(c).[17]

To hold otherwise, as did both courts below,[18] would read out of Section 102(2)(C) the requirement that there must be "major Federal actions significantly affecting" the environment and would result in requir-

---

the agency must prepare environmental impact statements before statements of record and property reports may become effective as provided in the Act.

Section 1406(5) of the Disclosure Act recognizes that disclosure of some of the environmental aspects of a subdivision is necessary to protect prospective purchasers. It therefore requires such information in the statement of record and property report. The developer must provide information on such factors as roads, water, sewage, drainage, soil erosion, climate, nuisances, natural hazards, municipal services and zoning restrictions.

Section 1408(a) of the Disclosure Act, 15 U.S.C. 1707(a), confers on the Secretary authority to require by rule or regulation "other information" from developers in both the "public interest" and for the "protection of purchasers." The Secretary, therefore, has authority to adopt rules requiring environmental information from developers to be incorporated into property statements to be furnished to prospective purchasers. This is obviously different from conditioning the effectiveness of property statements and statements of record on preparation by OILSR of environmental impact statements.

[17] See *Biderman* v. *Morton*, 497 F.2d 1141, 1148 (C.A. 2): "The statutory scheme devised by Congress leaves the Secretary absolutely powerless to arrest the allegedly destructive development * * *. We simply cannot, by granting injunctive relief, arm the Secretary with 'go-ahead' power when Congress * * * saw fit not to do so."

[18] The court of appeals said that one of the purposes of NEPA "is to require the giving of attention to environmental problems regardless of whether the agency has authority to do anything about it" (Pet. App. A, p. 10a).

The district court said that "whenever a Federal agency makes a decision which permits action by other parties, public or private,

ing federal agencies to prepare impact statements evaluating the effects of private activities that they do not initiate, participate in or control.[19] Yet "[t]he unequivocal intent of NEPA is to require agencies to consider and give effect to the environmental goals set forth in the Act, not just to file detailed impact studies which will fill governmental archives." *Environmental Defense Fund* v. *Corps of Engineers,* 470 F. 2d 289, 298 (C.A. 8);[20] see *Gage* v. *United States Atomic Energy Commission,* 479 F. 2d 1214, 1220 n. 19 (C.A.D.C.).

Indeed, it is not simply that NEPA imposes no duty on OILSR to prepare environmental impact statements when developers file; the agency is forbidden by the Disclosure Act from voluntarily undertaking such a task. Under Section 102(2)(C) of NEPA, OILSR's preparation of an impact statement would require it to pass upon the merits of the subdivision, to assess the private project in terms of its positive and negative environmental effects, to evaluate the alternative uses of the land[21]—in short, to en-

---

which will affect the quality of the human environment, such decision constitutes major federal action, which is what occurred in this case" (Pet. App. C, p. 26a).

[19] See Note, *Scenic Rivers Association* v. *Lynn: The Effect of NEPA on the Interstate Land Sales Act*, 124 U. Pa. L. Rev. 250 (1975).

[20] In the instant case, it is hardly clear what the district court expected OILSR to do as a result of its preparing the impact statement, except to file it with the court and make it available under the Freedom of Information Act, 5 U.S.C. 552. Pet. App. C, pp. 31a–33a; Tr. 559–560.

[21] See generally the Council on Environmental Quality's Guidelines, 40 C.F.R. 1500.8 ("Content of environmental statements").

gage in the kind of activity Congress prohibited it from doing.[22]

If OILSR must prepare impact statements, as the court of appeals held, a consumer protection statute of intentionally limited scope would be turned into a far-reaching scheme of federal land use planning and controls, despite the fact that Congress decided to leave this regulatory area to state and local governments,[23] where the responsibility traditionally has been.[24]

Moreover, the Disclosure Act provides that a statement of record becomes effective automatically 30 days after filing unless the Secretary acts affirmatively, within that time, to suspend it for inadequate disclosure. 15 U.S.C. 1706.[25] It is inconceivable that in 30 days an environmental impact statement could be prepared, circulated, commented upon, and then re-

---

[22] See S. Rep. No. 1123, *supra*, at 110.

[23] The legislative decision to approach the problem through full disclosure rather than substantive regulation was deliberately chosen after several years of congressional consideration. See generally Coffey and Welch, *Federal Regulation of Land Sales: Full Disclosure Comes Down to Earth*, 21 Case Western Reserve L. Rev. 5 (1969).

[24] Many state and local governments impose environmental regulation upon new subdivisions. See Fifth Annual Report of the Council on Environmental Quality 49–70 (1974).

[25] Compare Section 8(a) of the Securities Act of 1933, 15 U.S.C. 77h(a), which provides that the registration statement for a securities offering becomes effective twenty days after it is filed, in the absence of a delaying amendment by the registrant or a stop order proceeding by the Securities and Exchange Commission. See *Jones* v. *Securities & Exchange Commission*, 298 U.S. 1, 15–18.

viewed in light of the comments.[26] This in itself indicates that NEPA does not require OILSR to prepare impact statements—the 30-day period is inadequate to allow for the kind of careful, long-range planning NEPA envisions.[27]

---

[26] The Council on Environmental Quality Guidelines provide that "[t]o the maximum extent practicable" no action should be taken sooner than 90 days after a draft environmental impact statement (and 30 days after a final environmental impact statement) has been made available to the various agencies, the Council on Environmental Quality, and the public, for comment. 40 C.F.R. 1500.11(b). Agencies commenting on a draft statement are to have at least 45 days to make such comment. 40 C.F.R. 1500.9(f).

The Council on Environmental Quality also points out that (Sixth Annual Report, Council on Environmental Quality 639 (to be published February 1976)): "The Department of the Interior, with its great range of actions and internal administrative procedures, estimates that draft statements on simple projects prepared by experienced personnel require some 3 to 5 months, which time should be reduced in the near future. Complex projects, or simple ones prepared by the inexperienced, may double the time required, and complex projects prepared by inexperienced personnel may take up to 18 months to prepare. If a project or program is not considered on the critical path of Interior's decision process, as may be the case for some water resources and land management plans, then more time may be taken."

[27] Respondents contend that HUD Handbook 1390.1, the Handbook of Departmental Policies, Responsibilities and Procedures for Protection and Enhancement of Environmental Quality, 38 Fed. Reg. 19182 *et seq.*, amended 39 Fed. Reg. 38922, requires HUD to prepare an impact statement before a disclosure statement becomes effective under the Disclosure Act. See also HUD's Proposed Rules revising the Handbook. 39 Fed. Reg. 6816 *et seq.* This is incorrect. By its own terms, the Handbook does not apply to registrations under the Disclosure Act. It is true that Section 5(a)(1) of the Handbook, 38 Fed. Reg. 19185, does not specifically list sub-

The court of appeals attempted to avoid this problem, stating that "[t]here is nothing in the statute, however, which prohibits the agency from suspending a statement of record pending the preparation and filing of an impact statement" (Pet. App. A, p. 9a). On the contrary, the Disclosure Act expressly limits HUD's suspension power to situations in which the developer has failed to make the required disclosure. 15 U.S.C. 1706. The court of appeals' reading of the statute renders the 30-day provision a nullity in regard to every subdivision that has sufficient environmental impact to require some form of environmental clearance. In such cases, no statements of record could go into effect within the 30 days provided by Congress, yet the purpose of that provision, as the court below itself recognized (Pet. App. A, p. 9a), is to protect developers from costly delays as a result of the need to register with HUD.[28]

---

division registrations among activities exempt from the agency's NEPA procedures and states that except for those exemptions, "all HUD actions must undergo one or more environmental clearances." However, Section 1 of the Handbook states that its provisions apply to "HUD legislative proposals, policy and guidance documents * * * and individual project approval actions on insurance, loans and grants, subsidies and demonstration projects." 38 Fed. Reg. 19182. Subdivision registrations do not fall within any of these categories.

[28] The court of appeals also suggested that "a developer could give advance notice to HUD of its intent to sell land in interstate commerce, whereby HUD could commence the preparation of its impact statement" (Pet. App. A, pp. 9a–10a). Such an approach would not avoid the long delays inherent in preparing an impact statement because the agency could not begin to weigh the environmental merits of a project until the plans were fully worked out—

Congress designed the Disclosure Act to be strictly and exclusively a disclosure statute for the protection of purchasers of land in the same way that the Securities Act of 1933, on which it was modeled, protects investors. NEPA does not repeal prior legislation by implication; it does not apply where its mandate and that of another statute are mutually exclusive;[29] and it does not give HUD substantive regulatory authority that Congress specifically denied it in the applicable statute.[30]

Thus, while NEPA may, in some sense, be described as a "disclosure law," this does not convert OILSR's limited authority into a power to weigh the environ-

---

at which point the developer would be ready to file his disclosure statement and begin sales.

[29] Sections 104, 105, 42 U.S.C. 4334, 4335; see *United States* v. *SCRAP*, 412 U.S. 669, 694.

[30] Because the language and legislative history of the Disclosure Act make clear that it confers on HUD no power to approve, endorse, guarantee, or finance developments, the court of appeals erred in relying on cases under other statutes involving such major federal actions as approvals, licenses, funding or guarantees (Pet. App. A, pp. 6a–9a). Its error is illustrated by its reliance on *Davis* v. *Morton*, 469 F. 2d 593 (C.A. 10), which it described as dealing "with a matter * * * very similar to that here presented" (Pet. App. A, pp. 6a–7a). In that case the court held that an impact statement was required from the Department of the Interior for a long-term lease of Indian lands to a real estate developer. The lease repeatedly referred to the federal government, its rights and liabilities. More importantly, the Secretary of the Interior was required, acting in a fiduciary capacity, to make a determination on the substantive merits of the lease. In fact, he was specifically required to consider the environmental effects of the lease. 25 U.S.C. 415. No similar substantive regulatory authority is granted to, or exercised by, HUD under the Disclosure Act.

mental merits of private real estate developments (Pet. App. A, p. 11a). NEPA is primarily a tool for agency planning and decisionmaking, requiring the study and disclosure of environmental consequences of agency decisions in the belief that the process itself and the public scrutiny it allows will ultimately result in federal decisionmaking that weighs all aspects of the public interest. But NEPA is not intended to make federal agencies "disclose" the environmental effects of private decisions over which they have no substantive control. Since OILSR cannot pass on the environmental merits of subdivisions described in adequate disclosure statements and cannot, because of objections on environmental grounds, take any other action to prevent sales of lots within them, impact statements would constitute nothing more than a massive and unnecessary administrative burden on OILSR. See pp. 10–11, *supra*.

Furthermore, the decision below has serious implications for other federal agencies with which disclosure statements describing private offerings must be filed. As noted above, the Disclosure Act is patterned on the disclosure provisions of the Securities Act of 1933, 48 Stat. 77–80, as amended, 15 U.S.C. 77e–77h. If, as the court of appeals indicates (Pet. App. A, p. 8a), the Securities and Exchange Commission must prepare environmental impact statements in regard to offerings of corporate securities,[31] that agency, which supports this brief, advises that the na-

[31] The court of appeals' observation (Pet. App. A, p. 8a), that NEPA applies to securities offerings misreads the authority cited

tion's private capital markets could be severely affected by the resulting delays.[32]

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
PETER R. TAFT,
Assistant Attorney General.
A. RAYMOND RANDOLPH, JR.,
Deputy Solicitor General.
HOWARD E. SHAPIRO,
Assistant to the Solicitor General.
CARL STRASS,
CHARLES E. BIBLOWIT,
Attorneys.

FEBRUARY 1976.

(*National Resources Defense Council, Inc.* v. *Securities & Exchange Commission*, 389 F. Supp. 689 (D. D.C.)). That case held only that Securities and Exchange Commission rule-making dealing with the inclusion of environmental information in registration statements had not complied with the Administrative Procedure Act. It in no way suggests that impact statements must be prepared for each registration statement the Securities and Exchange Commission allows to become effective.

[32] In fiscal year 1973, 3,281 registration statements became effective pursuant to the Securities Act of 1933. Securities and Exchange Commission 39th Annual Report 31 (1974). Some 2,890 registration statements became effective during fiscal 1974 (Securities and Exchange Commission, 40th Annual Report 167 (1975)) and the Commission records show that in fiscal 1975, 2,781 statements involving offerings with an aggregate value of $77.46 billion became effective.

APPENDIX

Sections 102–105 of the National Environmental Policy Act of 1969, 83 Stat. 853–854, 42 U.S.C. 4332–4335, provide as follows:

SEC. 102 [42 U.S.C. 4332]. The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall—

"(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

"(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantitied environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

"(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

"'(i) the environmental impact of the proposed action,

"'(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

"'(iii) alternatives to the proposed action,

"'(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

"'(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.'

"Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

"(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

"(E) recognize the worldwide and long range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

"(F) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintain-

ing, and enhancing the quality of the environment;

"(G) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

"(H) assist the Council on Environmental Quality established by title II of this Act."

SEC. 103 [42 U.S.C. 4333]. All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this Act.

SEC. 104 [42 U.S.C. 4334]. Nothing in Section 102 or 103 shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

SEC. 105 [42 U.S.C. 4335]. The policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies.

The Interstate Land Sales Full Disclosure Act, 82 Stat. 590, as amended, 15 U.S.C. 1701 *et seq.*, provides in pertinent part:

PROHIBITIONS RELATING TO THE SALE OR LEASE OF LOTS IN SUBDIVISIONS

SEC. 1404 [15 U.S.C. 1703]. (a) It shall be unlawful for any developer or agent, directly or

indirectly, to make use of any means or instruments of transportation or communication in interstate commerce, or of the mails—

"(1) to sell or lease any lot in any subdivision unless a statement of record with respect to such lot is in effect in accordance with section 1407 and a printed property report, meeting the requirements of section 1408, is furnished to the purchaser in advance of the signing of any contract or agreement for sale or lease by the purchaser;"

* * * * *

REGISTRATION OF SUBDIVISIONS

SEC. 1405 [15 U.S.C. 1704]. (a) A subdivision may be registered by filing with the Secretary a statement of record, meeting the requirements of this title and such rules and regulations as may be prescribed by the Secretary in furtherance of the provisions of this title. A statement of record shall be deemed effective only as to the lots specified therein.

(b) At the time of filing a statement of record, or any amendment thereto, the developer shall pay to the Secretary a fee, not in excess of $1,000, in accordance with a schedule to be fixed by the regulations of the Secretary, which fees may be used by the Secretary to cover all or part of the cost of rendering services under this title, and such expenses as are paid from such fees shall be considered non-administrative.

(c) The filing with the Secretary of a statement of record, or of an amendment thereto, shall be deemed to have taken place upon the receipt thereof, accompanied by payment of the fee required by subsection (b).

(d) The information contained in or filed with any statement of record shall be made available to the public under such regulations

as the Secretary may prescribe and copies thereof shall be furnished to every applicant at such reasonable charge as the Secretary may prescribe.

INFORMATION REQUIRED IN STATEMENT OF RECORD

SEC. 1406 [15 U.S.C. 1705]. The statement of record shall contain the information and be accompanied by the documents specified hereinafter in this section—

"(1) the name and address of each person having an interest in the lots in the subdivision to be covered by the statement of record and the extent of such interest;

"(2) a legal description of, and a statement of the total area included in, the subdivision and a statement of the topography thereof, together with a map showing the division proposed and the dimensions of the lots to be covered by the statement of record and their relations to existing streets and roads;

"(3) a statement of the condition of the title to the land comprising the subdivision, including all encumbrances and deed restrictions and covenants applicable thereto;

"(4) a statement of the general terms and conditions, including the range of selling prices or rents at which it is proposed to dispose of the lots in the subdivision;

"(5) a statement of the present condition of access to the subdivision, the existence of any unusual conditions relating to noise or safety which affect the subdivision and are known to the developer, the availability of sewage disposal facilities and other public utilities (including water, electricity, gas, and telephone facilities) in the subdivision, the proximity in miles of the subdivision to nearby municipalities, and the nature of any improvements to be installed by the de-

veloper and his estimated schedule for completion;

"(6) in the case of any subdivision or portion thereof against which there exists a blanket encumbrance, a statement of the consequences for an individual purchaser of a failure, by the person or persons bound, to fulfill obligations under the instrument or instruments creating such encumbrance and the steps, if any, taken to protect the purchaser in such eventuality;

"(7)(A) copy of its articles of incorporation, with all amendments thereto, if the developer is a corporation; (B) copies of all instruments by which the trust is created or declared, if the developer is a trust; (C) copies of its articles of partnership or association and all other papers pertaining to its organization, if the developer is a partnership, unincorporated association, joint stock company, or any other form of organization; and (D) if the purported holder of legal title is a person other than developer, copies of the above documents for such person;

"(8) copies of the deed or other instrument establishing title to the subdivision in the developer or other person and copies of any instrument creating a lien or encumbrance upon the title of developer or other person or copies of the opinion or opinions of counsel in respect to the title to the subdivision in the developer or other person or copies of the title insurance policy guaranteeing such title;

"(9) copies of all forms of conveyance to be used in selling or leasing lots to purchasers;

"(10) copies of instruments creating easements or other restrictions;

"(11) such certified and uncertified financial statements of the developer as the Secretary may require; and

"(12) such other information and such other documents and certifications as the Secretary

may require as being reasonably necessary or appropriate for the protection of purchasers."

TAKING EFFECT OF STATEMENTS OF RECORD AND AMENDMENTS THERETO

SEC. 1407 [15 U.S.C. 1706]. (a) Except as hereinafter provided, the effective date of a statement of record, or any amendment thereto, shall be the thirtieth day after the filing thereof or such earlier date as the Secretary may determine, having due regard to the public interest and the protection of purchasers. If any amendment to any such statement is filed prior to the effective date of the statement, the statement shall be deemed to have been filed when such amendment was filed; except that such an amendment filed with the consent of the Secretary, or filed pursuant to an order of the Secretary, shall be treated as being filed as of the date of the filing of the statement of record. When a developer records additional lands to be offered for disposition, he may consolidate the subsequent statement of record with any earlier recording offering subdivided land for disposition under the same promotional plan. At the time of consolidation the developer shall include in the consolidated statement of record any material changes in the information contained in the earlier statement.

(b) If it appears to the Secretary that a statement of record, or any amendment thereto, is on its face incomplete or inaccurate in any material respect, the Secretary shall so advise the developer within a reasonable time after the filing of the statement or the amendment, but prior to the date the statement or amendment would otherwise be effective. Such notification shall serve to suspend the effective date of the statement or the amendment until thirty days after the developer files such additional infor-

mation as the Secretary shall require. Any developer, upon receipt of such notice, may request a hearing, and such hearing shall be held within twenty days of receipt of such request by the Secretary.

(c) If, at any time subsequent to the effective date of a statement of record, a change shall occur affecting any material fact required to be contained in the statement, the developer shall promptly file an amendment thereto. Upon receipt of any such amendment, the Secretary may, if he determines such action to be necessary or appropriate in the public interest or for the protection of purchasers, suspend the statement of record until the amendment becomes effective.

(d) If it appears to the Secretary at any time that a statement of record, which is in effect, includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statement therein not misleading, the Secretary may, after notice, and after opportunity for hearing (at a time fixed by the Secretary) within fifteen days after such notice, issue an order suspending the statement of record. When such statement has been amended in accordance with such order, the Secretary shall so declare and thereupon the order shall cease to be effective.

(e) The Secretary is hereby empowered to make an examination in any case to determine whether an order should issue under subsection (d). In making such examination, the Secretary or anyone designated by him shall have access to and may demand the production of any books and papers of, and may administer oaths and affirmations to and examine, the developer, any agents, or any other person, in respect of any matter relevant to the examination. If the developer or any agents shall fail

to cooperate, or shall obstruct or refuse to permit the making of an examination, such conduct shall be proper ground for the issuance of an order suspending the statement of record.

(f) Any notice required under this section shall be sent to or served on the developer or his authorized agent.

INFORMATION REQUIRED IN PROPERTY REPORT

SEC. 1408 [15 U.S.C. 1707]. (a) A property report relating to the lots in a subdivision shall contain such of the information contained in the statement of record, and any amendments thereto, as the Secretary may deem necessary, but need not include the documents referred to in paragraphs (7) to (11), inclusive, of section 1406. A property report shall also contain such other information as the Secretary may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of purchasers.

(b) The property report shall not be used for any promotional purposes before the statement of record becomes effective and then only if it is used in its entirety. No person may advertise or represent that the Secretary approves or recommends the subdivision or the sale or lease of lots therein. No portion of the property report shall be underscored, italicized, or printed in larger or bolder type than the balance of the statement unless the Secretary requires or permits it.

* * * * *

UNLAWFUL REPRESENTATION

SEC. 1417 [15 U.S.C. 1716]. The fact that a statement of record with respect to a subdivision has been filed or is in effect shall not be deemed a finding by the Secretary that the

statement of record is true and accurate on its face, or be held to mean the Secretary has in any way passed upon the merits of, or given approval to, such subdivision. It shall be unlawful to make, or cause to be made, to any prospective purchaser any representation contrary to the foregoing.

ROBERT R. ELLIOTT,
General Counsel,
K. H. SAUERBRUNN,
Assistant General Counsel,
PETER S. RACE,
Attorney.
Department of Housing and Urban Development.

U.S. GOVERNMENT PRINTING OFFICE: 1970